83-926

Office - Supreme Court, U.S
FILED
JAN 23 1984
ALEXANDER L. STEVAS,
CLERK

BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-296

AXEL-FELIX KLEIBOEMER, ET AL., *Petitioners,*

v.

THE DISTRICT OF COLUMBIA, *Respondent.*

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

INEZ SMITH REID,
Corporation Counsel, D.C.

CHARLES L. REISCHEL,
Deputy Corporation Counsel, D.C.

RICHARD L. AGUGLIA,
Assistant Corporation Counsel, D.C.
Chief, Finance Section
Counsel of Record for Respondent

District Building
Washington, D.C. 20004

QUESTIONS PRESENTED

(1) Whether petitioner raised below the principal argument in his petition, namely, that requiring class members to comply with a local claim-filing requirement in order to recover local taxes erroneously imposed deprived them of a vested property right?

(2) Whether the ruling below, requiring a claimant to file an individual refund claim in order to obtain a tax refund, offends the Due Process Clause of the Constitution of the United States?

(3) Whether it is appropriate for this Court to review a local law question of whether, and in what circumstances, the requirement of filing individual claims for refunds of local taxes might be tolled?

INDEX

SUBJECT INDEX

	Page
Questions Presented	i
Statement	2
Reasons for Denying the Writ	6
Conclusion	14

CASES CITED

Berenyi v. *Immigration Director*, 385 U.S. 630 (1967)	10, 11
Bd. County Commissioners v. *Seber*, 130 F.2d 663 (1942), *aff'd* 318 U.S. 705 (1943)	7
Bishop v. *District of Columbia*, 411 A.2d 997 (D.C. App. 1980) *(en banc)*, *cert. denied* 446 U.S. 966	5
Bob Jones University v. *Simon*, 416 U.S. 725 (1973)	9
California v. *Grace Bretheren Church*, 457 U.S. 393 (1981)	9
California v. *Taylor*, 353 U.S. 553 (1957)	6
Carpenter v. *Shaw*, 280 U.S. 363 (1930)	7
Chardon v. *Soto*, 103 S.Ct. 2611 (1983)	13
District of Columbia v. *Keyes*, 362 A.2d 729 (D.C. App. 1976), *cert. denied* 430 U.S. 968 (1977)	3
Dodge v. *Osborne*, 240 U.S. 118 (1916)	9
Fair Assessment in Real Estate Association, Inc. v. *McNary*, 454 U.S. 100, 116 (1981)	9
Fisher v. *United States*, 328 U.S. 463 (1946)	13
Graver Mfg. Co. v. *Linde*, 336 U.S. 271 (1949)	10
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977)	11
Mathews v. *Eldridge*, 424 U.S. 319 (1976)	9
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)	10
New York ex rel Bryant v. *Zimmerman*, 278 U.S. 63 (1928)	6-8

CASES CITED (Continued)

Pernell v. *Southall Realty*, 416 U.S. 363 (1974) . . 13
Pruneyard Shopping Center v. *Robins*, 447 U.S. 74 (1980) 6, 8
United Airlines v. *McDonald*, 432 U.S. 385 (1977) 13, 14
Ward v. *Bd. of Commissioners Love County*, 253 U.S. 17 (1920) 7

CONSTITUTION OF THE UNITED STATES CITED

Due Process Clause of the Fifth Amendment . . . 6-11

DISTRICT OF COLUMBIA CODE, 1973 CITED

Section 47-1574 (Supp. V, 1978) (1981, §47-1808.1) 2
Section 47-1586j (1981, § 47-1812.11) 2-5, 12

APPENDIX

A. Opinion and Order of the Trial Court, dated September 24, 1981 (A1-A21).

B. Title Page, Table of Contents and Table of Citations of Petitoner's brief in the Trial Court (B1-B3).

C. The Due Process argument made by petitioner in the District of Columbia Court of Appeals (C1-C4).

D. Consent Judgement of the Trial Court, dated October 22, 1980 (D1-D5).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-296

AXEL-FELIX KLEIBOEMER, ET AL., *Petitioners,*

v.

THE DISTRICT OF COLUMBIA, *Respondent.*

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

In 1975, respondent (hereinafter "the District") imposed for the first time a tax on the business income of professionals, whether trading as an unincorporated business or as a professional corporation in the District of Columbia. D.C. Law 1-23, § 605 (D.C. Code 1973, § 47-1574 (Supp. V 1978). The tax was commonly referred to as the "professional" tax. On March 25, 1976, petitioner Kleiboemer paid the tax and simultaneously filed a timely individual claim for refund at the administrative level as required by statute (D.C. Code 1973, § 47-1586j*) as a prerequisite to suit. His claim for refund was denied by the District's Department of Finance and Revenue the next day. On April 5, 1976, petitioner filed a class action petition for refund of the entire professional tax in the Tax Division of the Superior Court of the District of Columbia. His suit was consolidated with a similar refund suit filed by Richard A. Bishop who has not joined in this petition. Hearings were held and, on October 18, 1977, the trial court denied petitioner's and Bishop's requests for refund and dismissed their petitions with prejudice. In a separate order entered on that same day, the trial court certified the case as a class action maintainable under Superior Court Rules 23(b)(1)(A) and 23 (b)(1)(B), except for Bishop.[1]

On October 27, 1977, the trial court, *sua sponte*, modified its October 18, 1977 order and ruled that petitoners were entitled to a refund of all professional taxes paid by them prior

---

*References to the D.C. Code will be to the 1973 edition, the edition in use during the course of this case. The updated 1981 Code references are contained in the Index. Section 47-1586j requires, in essence, the filing of an individual claim for refund by the taxpayer, in writing and under oath, within three years of payment of the tax. The relevant language of Section 47-1586j is set forth at page 12, note 10, *infra*.

[1]Bishop was excluded at his own request from the class when it was certified.

December 1, 1975.[2] In awarding refunds, however, the Court required that:

> Any members of the class who were fiscal year taxpayers and *had perfected their claim for refund as provided by law,* would now be entitled to a refund or credit consistent with the above opinion . . . . (Memorandum Order of October 27, 1977 at 9; emphasis supplied, Pet. at 4, 5)

In a separate order, also entered on October 27, 1977, the trial court provided:

> ORDERED that the class consists of those nonresident taxpayers who have paid the unincorporated business franchise tax pursuant to D.C. Code 1973, Sec. 47-1574b (Supp. IV, 1977), except for Richard A. Bishop (See Tax Docket No. 2362), and it is further
>
> ORDERED that the petitioner, Axel-Felix Kleiboemer, is hereby granted a refund for the franchise tax he paid for the period January 1, 1975 through November 30, 1975, together with interest as provided by law, and it is further
>
> ORDERED that the members of the class shall be entitled to refund of taxes, consistent with the Opinion and Order as modified by the Memorandum Order, *provided they have compiled with or comply with D.C. Code 1973, Sec. 47-1586j.* Cf., *D.C.* v. *Keyes,* 362 A.2d 729 (D.C. App. 1976) (Emphasis supplied; Petitoner's App. 24a-25a)

Petitioner (and Bishop) appealed the trial court's October 18, 1977 decision sustaining the validity of the professional

---

[2]Although the trial court held the basic tax valid, it held that the District impermissibly discriminated against calendar year taxpayers in favor of fiscal year taxpayers in implementing the tax and that calendar year taxpayers were entitled to a refund of all taxes paid by them prior to December 1, 1975.

tax for tax years after 1975, but petitioner did not appeal the trial court's subsequent October 27, 1977 decision awarding refunds for 1975 provided class members ". . . had perfected their claim for refund as provided by law," that is, "complied with or comply with D.C. Code 1973, Sec. 47-1586j".

About one year later, on November 30, 1978, while the validity of the professional tax was on appeal to the District of Columbia Court of Appeals, petitioner filed with the trial court a motion for an order "compelling inclusion of notice *to members of the class*" of the expiring redemption period set forth in D.C. Code 1973, § 47-1586.[3] (Emphasis supplied) The proposed notice was to be included with tax returns being mailed to class members by the District in December, 1978. At hearing on the motion, counsel for petitioner stated that the October 27, 1977 ". . . judgment itself specifically contemplated that *the members of the class* comply with 1586(j) . . .". (Emphasis supplied)

On December 11, 1978, prior to the trial court's ruling on the motion to compel inclusion of notice to class members of the expiring three year redemption period, petitioner filed one claim for refund at the administrative level on behalf of all non-residents subject to the professional tax and who had paid the tax. On December 26, 1978, the District's Department of Finance and Revenue denied petitioner's class claim for refund. On December 20, 1978, petitioner filed a class claim for refund with the trial court. On January 3, 1979, the trial court declared the class claim for refund null and void since it

> . . . does not comply with the requirements of D.C. Code 1973 § 47-1586j and with this Court's [unappealed] order of October 27, 1977.

The trial court did hold that individual notice had to be given to the class members of the statutory requirement to file a

---

[3] The District of Columbia Court of Appeals permitted a remand of the record for consideration of this motion.

claim for refund, not only regarding 1975, but also 1976 through 1978. The District's Department of Finance and Revenue issued the individual notices in December, 1978 along with tax returns.

On appeal, the District of Columbia Court of Appeals *en banc* held invalid the professional tax. *Bishop* v. *District of Columbia*, 411 A.2d 997 (1980). Following this Court's denial of the District's petition for a writ of *certiorari* (446 U.S. at 966), the Court of Appeals mandate was returned to the Superior Court on May 29, 1980. On October 22, 1980, the trial court entered a consent judgment directing refunds to class members who had paid the tax and had also filed timely and individual claims for refunds pursuant to D.C. Code 1973, § 47-1586(j).

That consent judgment reserved for subsequent decision the issue raised here by petitioner, that is, the necessity of individual and timely refund claims pursuant to statute. Pursuant to the consent judgment, the District refunded approximately $32,250,000, including interest and attorneys fees, or 94% of the tax collected to 7,517 taxpayers who submitted individual and timely claims for refund (Pet's. App. 29a-30a). The consent judgment also provided for the mailing of a claim form to all known non-resident professional who had paid the tax.

On September 24, 1981, the trial court (Fauntleroy, J.) reaffirmed the prior ruling (Penn, J.) that "the timely filing of individual claims at the administrative level by affected taxpayers is a prerequisite to refunds in this suit . . .".[4]

On appeal, the District of Columbia Court of Appeals affirmed in two separate decisions, holding:

> The tax was not initially held lawful until a year and one-half after it came due and that decision was promptly appealed, so that taxpayers might have

---

[4]See Respondent's Appendix "A", attached to this Opposition.

pursued their administrative remedies with some hope of success.

Extensive notice of the claim requirement was given in the media, in business and professional publications, by mail, and in seminars.

The trial court expressly held this notice to be sufficient.

No appeal was taken from the October 27 order first giving petitioners notice that individual claims were required (and petitioners appeared to understand that the October 27 order did require individual claims). (Pet.'s App. 17a-18a; footnote omitted; emphasis supplied)

This petition for a writ of *certiorari* to review the decisions of the District of Columbia Court of Appeals followed on December 5, 1983.

REASONS FOR DENYING THE WRIT

I. Petitioner did not raise below the principal argument in his petition, namely, that requiring class members to comply with a local claim-filing requirement in order to recover local taxes erroneously imposed deprives them of a vested property right.

It is well established that this Court will not ordinarily consider questions that have not been raised and briefed below. See, e.g., *California* v. *Taylor*, 353 U.S. 553, 557, n.2 (1957). Furthermore, in *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85, n.9 (1980), this Court stated:

> It is well settled that in challenging the validity of a state law on the ground that it is repugnant to the Constitution of the United States, "[n]o particular form of words or phrases is essential, but only that *the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.* And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmer-*

man, 278 U.S. 63 at 67, 73 L.Ed. 184, 49 S.Ct. 61, 62 ALR 785. (Emphasis supplied)

The principal argument in the petition here (Petition, pp. 9-10) was not presented at all to the courts below.

In so far as we understand it, petitioner's principal argument in favor of a grant of *certiorari* (Petition at 9-10) is that any requirement that class members comply with the applicable claim-filing procedures to obtain refunds of taxes erroneously imposed deprives them of due process of law because it divests them of a vested right. That right is apparently the "right" to be "exempted . . . from the commuter [professional] tax . . . ." (*Id.* at 10). Petitioner relies on *Ward* v. *Bd. of Commissioners Love County*, 253 U.S. 17 (1920); *Carpenter* v. *Shaw*, 280 U.S. 363 (1930); *Bd. County Commissioners* v. *Seber*, 130 F.2d 663 (1942), *affd.* 318 U.S. 705 (1943). No such argument was ever made to either of the courts below.

In the trial court, petitioner made no due process argument at all.[5] As argued in the petition (p. 8), petitioner did make a due process argument in the District of Columbia Court of Appeals. But the argument he made there is very different from the principal argument he now advances in his petition to this Court.[6]

In the Court of Appeals, petitioner argued that class members were being denied due process principally because, as the trial court defined the class, the entire class would be bound by a decision adverse to it (that is, a decision that the tax challenged was valid); however, because of the court's ruling that each class member must file a timely claim to obtain refunds, if the class prevailed, all class members would not realize the fruits of the victory (See Appendix "C" hereto

---

[5] We have attached as Appendix "B" to this Opposition, the title page, table of contents, and table of citations of petitioner's brief in the trial court.

[6] We have attached to this Opposition as Appendix "C" the due process argument petitioner made in the District of Columbia Court of Appeals.

at pp. C-1 - C-4). Petitioner also argued, in essence, that it was fundamentally unfair for class members to have to decide whether to file claims prior to knowing that the Court of Appeals would hold the tax invalid (*Id.* at p. C-3), and because, despite the District Government's efforts, some class members did not receive written notice of the need to file a claim for refund prior to the expiration of the time in which they were required to do so (*Id.* at p. C-3). Petitioner made no mention of any purported "vested right" to be immune from a commuter or professional tax; did not argue that the requirement of filing administrative claims for a tax erroneously imposed constituted a *per se* violation of due process; and did not cite any of the decisions it now relies upon in its principal argument.

There is no question that the principal due process argument advanced in the petition was not made to the courts below with the "fair precision" required by *Pruneyard Shopping Center* v. *Robins, supra,* and *New york ex rel Bryant* v. *Zimmerman, supra.* Thus the Court of Appeals understood their due process argument as follows:

> Petitioners contend as well that the division opinion failed to address their argument that *members of the class, having been bound by the trial court judgment adverse to them* until this court reversed it (after the stautory period for claims expired), *would be denied due process if they were denied the benefits of this Court's final judgment holding the tax illegal. This argument was made in less than 3 pages of a 49-page brief. No cases were cited* in direct support of the argument, *and it was essentially urged that it would be extremely harsh and fundamentally unfair to reach the result the division did reach.* (Pet.'s App. 20a; emphasis supplied).

Since petitioner did not provide the courts below with an opportunity to address the argument they now advance, this Court clearly should not undertake to review the decision below on that ground.[7]

---

[7]Even if it were appropriate for this Court to consider the question, review would properly be denied because petitioner's argument is frivolous. The Court

[Footnote continued on next page]

II. The ruling below that, in order to obtain a tax refund, a claimant must file an individual refund claim, does not offend the Due Process Clause of the Constitution of the United States.

Petitioner argues that the decision below offends due process for essentially two reasons: (1) Some individual taxpayers did not receive actual notice that they were required to file a claim for refund prior to the expiration of the period for doing so (Pet., p. 15), and (2) "[d]ue process and fundamental fairness require that because all class members were bound by the trial court's judgment, respondent must be bound by the trial court's judgment." (*Id.*).[8] Neither of these arguments has the slightest merit.

---

[7] continued from preceding page

has long held that requiring resort to an administrative body as a precondition to securing a tax refund does not violate due process. *Dodge* v. *Osborne*, 240 U.S. 118, 122 (1916). *Cf.* also *Bob Jones University* v. *Simon*, 416 U.S. 725, 748-750 (1973). Furthermore, the Court has specifically held that resort to state administrative procedures is required to challenge the validity of a tax, even were the tax is alleged to violate the federal constitution. *California* v. *Grace Bretheren Church*, 457 U.S. 393, 407-413 (1981). See also *Fair Assessment in Real Estate Association, Inc.* v. *McNary*, 454 U.S. 100, 116 (1981) (Taxpayers cannot challenge allegedly unconstitutional administration of state tax system under 42 USC §1983, but "must seek protection of their federal rights by state remedies . . . ."). These decisions preclude petitioner's argument that requiring administrative resort as a precondition of obtaining a refund of an invalid tax constitutes a denial of due process *per se*.

[8] Petitioner also argues that the individual claim requirement must be assessed in light of the factors outlined in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), namely, the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (Pet. at 11-14). The flaw in the argument, however, is apparent from *Mathews* itself, which involved a requirement that individuals file claims as a precondition to seeking the relief in question. The Court made it clear that an individual claim requirement did not have to be analyzed with respect to the enumerated factors by holding that compliance was required with the claim requirement wholly apart from its factor analysis. (424 U.S. at 326-322).

As the Court of Appeals found, (Pet.'s App. 3a), the District of Columbia Government provided individual notice of the claim filing requirement

> in the District's mailing of 1978 tax return forms. However, some erstwhile members of the class did not actually receive the mailing, because they no longer operated unincorporated businesses in the District and hence were no longer obligated to file a return. Accordingly, the court in March 1979 directed the District to issue a press release to publicize the need by those who paid the tax for 1975 to file a return claim by April 15, 1979. On April 5, 1979, the court held that sufficient notice had been given to the class members regarding the administrative claim requirement. (Record at 138.)

The Court of Appeals further noted:

> During the period of litigation, extensive efforts were exerted by mail and by publication, to inform taxpayers of the need to file a claim; and the trial court expressly held such notice to be sufficient. (Pet's. App. 7a)

Claims were filed for refunds of almost $32,250,000 which represents about 94% of the total tax collected. (Pet.'s App. 29a-30a; the refunds actually paid ($30,247,126) had been decreased by $2,000,000 for attorneys fees to counsel for petitioner. See Resp.'s Appendix "D" at 2.

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), cited by petitioner (petition at 15), does not require individual notice to each potential claimant, but only "the best notice practicable." *Id.* at 314. Both courts below found that the District Government's efforts satisfied that standard. Accordingly, review by the Court would only be appropriate if petitioner made "a very obvious and exceptional show of error." *Graver Mfg. Co.* v. *Linde*, 336 U.S. 271, 275 (1949); *Berenyi* v. *Immigration Director*, 385 U.S.

630, 635 (1967). Petitioner has presented nothing to show that these rulings are incorrect.[9]

Petitioner's argument that class members were denied due process because the class and the District Government were not equally bound by the rulings below (Petition at 15) is similarly flawed. It ignores the fact that the trial court made two different rulings; one on liability (concerning the validity of the tax) and one on remedy (concerning eligibility for refunds). The fact that the class prevailed on the first did not entail that the entire class would prevail on the second, as petitioner posits. *Cf., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 361 (1977) (Recognizing that questions of liability and remedy are distinct, and that a favorable ruling on liability does not automatically require that the entire class involved receive relief). Therefore, the fact that the class prevailed on the liability issue, but not on the remedy question, does not establish any fundamental unfairness.

III. It would be inappropriate for this Court to review the local law question of whether, and in what circumstances, the requirement of filing individual claims for refunds of local taxes might be tolled.

The District of Columbia Court of Appeals rejected petitioner's argument that a single claim should toll the claim-filing requirement issue here for essentially two reasons.

---

[9]Petitioner asserts

> The District had a list of taxpayers that included the names and addresses of those individuals who did not receive the December 1978 notice; however, respondent chose not to notify these individuals by mail. (Pet., p. 6)

There is no support in the record for these assertions, and they are untrue. Petitioner apparently infers that, because the District was able to estimate the number of taxpayers who failed to file claims within the requested time period (See Pet.'s App. 30a), the District knew, before claims were due, who had not received notice. The inference is not reasonable: one cannot tell who will not file within a period until the period has expired. As stated, it is also incorrect.

First, the court looked to whether such tolling would be consistent with the specific language of this particular provision and the policy consideration underlying it. The court found that tolling would be inconsistent with "one of the important purposes served by the three-year filing deadline for tax refund claims" namely, "to protect the District against financial instability by setting a date certain by which the District may know the precise extent of its liability for refunds." (Pet.'s App. at 8a.) The court further believed that the language of the provision, which requires a claim for refund to be filed "by the taxpayer" also militated against such tolling. (Pet.'s App. at 1a.)[10] Second, the court reasoned that, even if the tolling principle which this Court has found applicable in different federal contexts was equally

---

[10]The statute in question here, D.C. Code § 47-1586j (1973) provides in pertinent part:

> (a) Refund to taxpayer.—
>
> . . . where there has been an overpayment of any tax imposed by this subchapter, the amount of such overpayment may be credited against any liability in respect to any income or franchise tax or installment thereof (whether such tax was assessed as a deficiency or otherwise), on the part of the person who made the overpayment, and the balance shall be refunded to such person.
>
> *No such credit or refund shall be allowed after three years from the time the tax was paid unless before the expiration of such period a claim therefor is filed by the taxpayer,* and no tax or part thereof which the Assessor may determine to have been an overpayment shall be refunded after the period prescribed therefore in the Act appropriating the funds from which such refund would otherwise be made. The amount of such credit or refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of such credit or refund. *Every claim for credit or refund must be in writing, under oath; must state the specific grounds upon which the claim is founded, and must be filed with the Assessor.* (Emphasis supplied.)

applicable to the local statute here, tolling would be inappropriate in the particular circumstances of this case, because the class members here did not "promptly move [ ] . . . to protect [their] interests." (Pet. App. at 9a, n.7 citing and quoting *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977). Specifically, the court found that, when the trial court ruled that only those class members who complied with the claim-filing requirement would be eligible to recover refunds, the class representatives did not appeal that ruling, even though the import of the ruling was plain and the class representatives clearly understood that individual compliance was required . (Pet.'s App. at 19a-20a.)

Despite the fact that the Court of Appeals' ruling is based both on the specific purposes and language of the particular statute involved here, and on the peculiar circumstances of this case, petitioner claims that his "claim to equitable tolling . . . raises an issue of great significance that is a matter of general nationwide applicability." (Pet. at 16, n. 7). That assertion is patently baseless.

As petitioner recognizes (*id.*), this Court will not review decisions of the Court of Appeals of the District of Columbia on local law questions "save in exceptional circumstance where egregious error has been committed." *Pernell* v. *Southall Realty*, 416 U.S. 363, 369 (1974), citing *Fisher* v. *United States*, 328 U.S. 463, 476 (1946). Petitioner apparently assumes that there is a particular federal interest of exceptional importance in having local courts apply the same tolling rules to local law issues that the Court has applied under federal statutes. That assumption is plainly incorrect. For, even where federal claims are involved, this Court has held that local, rather than federal, tolling rules may appropriately be applied. *Chardon* v. *Soto*, 103 S.C. 2611(1983). Accordingly, there can be no overriding federal interest in requiring that the tolling rules evolved in federal contexts be applied to purely local law questions.

Moreover,even if federal tolling principles were properly applied in the local law context here, petitioner has not shown that "egregious error" was committed. The Court of Appeals took great care to show how petitioner, in his representative capacity, did not move to protect class members' interests even after he knew they had been adversely affected. Petitioner does not even attempt to show that this was error under *United Airlines* v. *McDonald, supra,* and its precedessors, much less egregious error. Accordingly, petitioner has not shown that the exercise of this Court's *certiorari* jurisdiction is appropriate here.

CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

INEZ SMITH REID,
Corporation Counsel, D.C.

CHARLES L. REISCHEL,
Deputy Corporation Counsel, D.C.

RICHARD L. AGUGLIA,
Assistant Corporation Counsel, D.C.
Chief, Finance Section
Counsel of Record for Respondent

District Building
Washington, D.C. 20004

APPENDIX "A"

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

DOCKET NO. 2362

RICHARD A. BISHOP, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

and

DOCKET NO. 2379

AXEL-FELIX KLEIBOEMER, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

ORDER

It is hereby:

ORDERED that the timely filing of individual claims at the administrative level by affected taxpayers is a prerequisite to refunds in this suit, and it is further

ORDERED that the District of Columbia shall compute interest at 4% on the refunds from the date such individual claims are timely filed until the date of the making of the refund.

/s/ John D. Fauntleroy
JOHN D. FAUNTLEROY
Judge

September 24, 1981

cc: Philip L. Kellogg, Esq.
Bradley G. McDonald, Esq.
John M. Bixler, Esq.
Ronald D. Aucutt, Esq.
Richard L. Aguglia, Esq.
Carolyn L. Smith, Director
Department of Finance
and Revenue

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

DOCKET NO. 2362

RICHARD A. BISHOP, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

and

DOCKET NO. 2379

AXEL-FELIX KLEIBOEMER, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

INTRODUCTION

On October 20, 1980, the parties presented to this Court a proposed consent judgment which set forth the following three (3) unresolved issues in this case:

1. Whether a taxpayer who has failed to file a claim for refund under D.C. Code §47-1586j within three years from the time the tax was paid is entitled to receive a refund of the tax paid or, alternatively, whether the filing herein by the petitioner Axel-Kleiboemer of his individual claim for refund, his claim for refund filed for the class, and his class action petition constituted the timely filing of a claim or the timely filing of a petition by the members of the class.

2. Whether a taxpayer is entitled to receive a refund of tax paid for a year or years for which the statute of limita-

tions has not run if he fails to file a claim for refund under D.C. Code §47-1586j.

3. When interest as provided by law begins to run.

The judgment order, with some slight modifications not here relevant, was signed on October 22, 1980, and argument on these three issues was set for December of 1980. Briefs were filed, pursuant to the terms of the October 22, 1980 judgment order, with short extensions to both parties. After consideration of the arguments and briefs of the parties, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I

THE CLAIM FOR REFUND ISSUE

On March 25, 1976, petitioner Kleiboemer, the class representative in this suit,[1] paid the tax here in dispute and simultaneously filed an individual claim for refund at the administrative level as required by statute as a prerequisite to suit. That claim for refund was denied on March 26, 1976 by the Department of Finance and Revenue. On April 5, 1976, petitioner Kleiboemer filed a class action petition for refund of tax in the Tax Division of this court.

On October 18, 1977, the Tax Division of this Court denied the request of petitioners Bishop and Kleiboemer for refund in this case and dismissed their petitions with prejudice. In a separate Order entered on that same day, the Tax Division certified this case as a class action maintainable under Superior Court Civil Rules 23(b)(1)(A) and 23(b)(1)(B), except for petitioner Bishop. On October 27, 1977, the Tax Division, *sua sponte,* modified its October 18, 1977 opinion and

---

[1] Petitioner Bishop was excluded at his own request from the class when it was certified.

ruled that petitioners were entitled to a refund of all franchise taxes paid by them prior to December 1, 1975. The Court went on to state:

> Any members of the class who were fiscal year taxpayers and *has perfected their claim for refund as provided by law,* would now be entitled to a refund or credit consistent with the above [opinion]. . . .
>
> ORDERED that the class consists of those nonresident taxpayers who have paid the unincorporated business franchise tax pursuant to D.C. Code 1973, sec. 47-1574b (Supp. VI, 1977), except for Richard A. Bishop (See Tax Docket No. 2362), and it is further
>
> ORDERED that the petitioner, Axel-Felix Kleiboemer, is hereby granted a refund for the franchise tax he paid for the period January 1, 1975 through November 30, 1975, together with interest as provided by law, and it is further
>
> ORDERED that the members of the class shall be entitled to refund of taxes, consistent with the Opinion and Order as modified by the Memorandum Order, *Provided they have complied with or comply with D.C. Code 1973, Sec. 47-1586j. [Cf., D.C. v. Keyes, 362 A.2d 729 (D.C.App. 1976)]* (Emphasis supplied; 105 W.L.R. 2013, 2019.)

Both decisions were appealed.

On November 30, 1978, while these two decisions were bi-ing considered on appeal (App. Docket Nos. 12871, 12872, 12920 and 12921), petitioners filed with the Tax Division a motion for an order "compelling inclusion of notice to members of the class'" of the expiring redemption period set forth in D.C. Code §47-1586j in the District's December, 1978 mailing to class members. Petitioners went on to state in that motion that:

> By order dated October 27, 1977, this Court directed the refund of all taxes paid by members of the class . . . for the period January 1 through

> November 30, 1975, *provided they have complied with or comply with D.C. Code 1973, Sec. 47-1586j . . . 47-1586j requires all claims for refund to be filed within three years of the payment of the tax sought to be refunded.*
>
> In order to protect fully the rights of the members of the class, counsel are of the view that notice must be given to the class in a timely fashion to permit the filing of the necessary claims for refund. (Emphasis supplied; Motion at 1, 2.)

Subsequently, on December 12, 1978, and prior to the mailing of the requested notice to the class members, petitioner Kleiboemer filed one claim for refund at the administrative level on behalf of "*all* non-residents who are subject to the District of Columbia Unincorporated Business Tax by virtue of owning and engaging in the conduct of unincorporated personal service businesses in the District of Columbia and who have paid for the tax, except for Richard A. Bishop." (Emphasis supplied.) Thus, some two and one-half years after bringing suit, petitioner Kleiboemer, as the class representative, filed a class claim for refund at the administrative level. As stated above, prior to bringing this suit only an *individual* claim was filed by petitioner Kleiboemer on his own behalf at the administrative level. The classs claim for refund was rejected at the administrative level and respondent opposed the filing of that claim on behalf of the entire class at the trial level as contrary to the statutory requirement (§47-1586j) of individual claims. On the same date, respondent questioned the trial court's jurisdicton to hear and determine petitioner's motion, given the fact that its October 18 and 27, 1977 rulings efffectively disposed of all the issues at the trial level which were then currently on appeal.

On December 13, 1978, the District of Columbia Court of Appeals granted petitioners-appellants unopposed motion to remand the record (but not the merits of the case-in-chief),

so that the trial court could consider their motion to compel inclusion of a notice of the expiring limitations period to members of the class in the District's December, 1978 mailing.

On January 3, 1979, the Tax Division entered and Order pursuant to its oral ruling and declared null and void the class claim for refund as contrary to §47-1586j. The trial court did, however, find appropriate individual notice to the members of the class of the statutory requirement to file a claim for refund not only regarding tax year 1975, *but tax years 1976 through 1978 as well.*

On January 19, 1979, petitioner Kleiboemer filed a notice of appeal from the Tax Division's rejection of his class claim for refund (App. Docket No. 79-123). Subsequently, petitioner asked the Court of Appeals to defer the filing of any further appellate pleadings on this issue until after final determination of the case-in-chief (i.e., the validity of the tax itself) had been made. Appellee-respondent opposed that motion and moved to dismiss the appeal as premature, since the trial court, on remand of the record, had yet to make a final determination of a remaining notice issue not germane to these proceedings. Action by the Court of Appeals on the District's motion to dismiss was stayed pending a final determination by the trial court of all remaining issues.

On March 15, 1979, the trial court decided all remaining issues on remand of the record and petitioners filed a second appeal (App. Docket No. 79-574), which was consolidated with the first (App. Docket No. 79-123) for all purposes by the Court of Appeals on June 26, 1979. The Court of Appeals further stayed any action on those motions pending a final determination on the merits of the validity of the tax.

On February 12, 1980, the District of Columbia Court of Appeals, sitting *en banc,* reversed the judgment of the Tax Division and held that the tax in issue violated the proscription of a commuter tax as set forth in section 602(a) (5) of the Self-Government and Governmental Reorganization Act

(D.C. Code 1973, §1-147 a(5)(Supp. V, 1978). Its mandate was returned to the Tax Division on May 29, 1980 and, pursuant to that mandate, judgment for petitioners was entered by this Court on October 22, 1980. The terms of that judgment provided that, *inter alia*, the District notify affected taxpayers of the requirements for obtaining refunds, i.e., the filing of individual claims. With that notice, the District was required to supply and did supply a form entitled "Summary of Information Regarding Unincorporated Business Tax Refund", which would be treated by the District as a claim for refund form, if timely filed.

FINDINGS OF FACT

II

THE INTEREST ISSUE

This Court adopts the findings of fact contained above and determines that the question of when interest must be paid by the District of Columbia on overpayments claimed by taxpayers is governed by the relevant District of Columbia Code citation, 1973 ed., §47-2413 (c), which provides for the award of interest on overpayments of tax reads as follows:

> (c) Any other provision of law to the contrary notwithstanding, if it is determined by the Commissioner or by the Superior Court that there has been an overpayment of any tax, whether as a deficiency or otherwise, interest shall be allowed and paid on the overpayment at the rate of 4 per centum per annum from the date the overpayment was paid until the date of refund, *but with respect to that part of any overpayment which was not assessed and paid as a deficiency or as additional tax interest shall be allowed and paid only from the date of filing a claim for refund* or a petition to the Superior Court as the case may be. (Emphasis supplied.)

CONCLUSIONS OF LAW

I

THE CLAIM FOR REFUND ISSUE

The Tax Division (Penn, J.) held invalid the District's imposition of the unincorporated business tax for the first eleven (11) months of 1975. The trial court made it perfectly clear, however, that individual claims for refund within the meaning of §47-1586j were necessary. It, therefore, rejected petitioner Kleiboemer's class claim for refund for the 1975 taxable year. Aware of the expiring statute of limitations for other years in which taxes were paid pending resolution of the validity of the tax by the Court of Appeals, *the trial court also rejected petitioner's class claim for refunds for 1976 through 1978.* In this regard the trial court stated that the class members should be individually notified (and were) of "the statutory requirement to file a claim for refund . . . and . . . that such notice should include notice not only regarding tax year 1975, *but tax years 1976 through 1978 as well.*" (Order at 1, 2; Emphasis supplied.)

The Court's subsequent Order of January 3, 1980, when combined with those of October 18 and 27, 1977, leaves no doubt that the class here represented has been judicially defined as:

(1) non-resident professionals doing business in the District and subjected to tax since 1975,
(2) who have paid the tax, and
(3) *who have filed individual claims for refund under* §47-1586j,
(4) except for Richard A. Bishop.

This Court concludes, therefore, that Judge Penn has ruled that a timely administrative claim is a prerequisite to a refund of the tax paid, and as such, is the law of the case.

Even assuming Judge Penn had not already ruled that the filing of timely individual claims for refund was a predicate

to recovery, this Court, for the reasons that follow, would have so held:

The relevant District of Columbia stature, §47-1586j, 1973 ed. (Supp. VII, 1980), reads in part as follows:

> (a) Refund to taxpayer. —
>
> . . . . where there has been an overpayment of any tax imposed by this subchapter, *the amount of such overpayment* may be credited against any liability in respect of any income or franchise tax or installment thereof (whether such tax was assessed as a deficiency or otherwise), on the *part of the person who made the overpayment*, and the balance shall be refunded to such person.
>
> *No such credit or refund shall be allowed after three years from the time the tax was paid unless before the expiration of such period a claim therefor is filed by the taxpayer, and no tax or part thereof which the Mayor may determine to have been an overpayment shall be refunded after the period prescribed therefor in the Act appropriating the funds from which such refund would otherwise be made.* The amount of such credit or refund shall not exceed the portion of then tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of such credit or refund. *Every claim for credit or refund must be in writing, under oath; must state the specific grounds upon which the claim is founded, and must be filed with the Mayor.* (Emphasis Supplied.)

The words emphasized in the above Section by respondent have remained virtually unchanged[2] since Everett Dirksen referred Bill H.R. 2282[3] to the committee on the District of Columbia on February 27, 1947. The purpose of the statute is clear — to limit refunds on overpayments to named persons in amounts specified in writing within a certain time frame for budgetary purposes. Thus, unless a taxpayer

---

2 The word "Mayor" has been inserted in place of the word "Assessor".

3 H.R. 3737 (80th Cong., 1st Sess., 1947) was the bill actually reported out.

claims in writing that a specified amount of tax has been overpaid, more than three years from payment, no refund will be allowed. In this way, the District of Columbia, through the Congress of the United States, may forecast and plan for its fiscal obligations and comply with Charter requirements that the District's budget must be balanced and the District cannot expend funds in excess of its revenues. Self-Government Act §442(a)(1), 448, and 603(c). This conclusion is bolstered by the language of the statute itself:

> . . . and *no* tax or part thereof which the Mayor may determine to have been an overpayment shall be refunded after the period prescribed therefore *in the Act appropriating the funds from which such refund would otherwiser be made.*

Moreover, Judge Penn provided for individual notice to these taxpayers (in the District's December 1978 mailing, as stated above) of the requirement to file separate claims for refund for the taxable years 1975-1978. At the time of that mailing, the applicable statute of limitations had not run on any year involved in these proceedings.

Further, the notice attached to this Court's judgment order of October 22, 1980, was required by that very order to be mailed to all affected taxpayers. The notice informed taxpayers of their right to complete an enclosed form to be treated by the District as a timely refund claim for all open years. At the time of the mailing, 1977, 1978, 1979 and 1980 were all years for which the applicable statute of limitations had not run.

The Court is also cognizant of the fact that further notice of the requirement to file individual claims for refund for 1975 (and a suggestion to file for all years) appeared in the *District Lawyer,* Feb. 1978, Vol. 2, No. 3 at 57-58 and in several newspaper articles. See, for example, page B-2 of the April 5, 1979 edition of the Washington Post.

It is, therefore, difficult to perceive how the taxpayers have been injured by the requirements of individual claims for refunds.

The requirement of an individual claim for refund is supported by the case of *District of Columbia* v. *Keyes*, 362 A.2d 729 (D.C. App. 1976). In that case, Arthur and Lucille *Keyes, on behalf of themselves and others similarly situated,*[4] brought suit against the District for partial refunds paid in fiscal year 1973 on all single-family residential properties in the District of Columbia which were assessed at 60% of estimated market value. The trial court awarded the refunds sought. In reversing, the appellate court noted that the refund of taxes illegally or erroneously assessed and voluntarily paid was not permitted at common law and was a matter within the purview of the legislative branch. The Court further found that under the statutory procedure applicable to the case, the recovery of refunds through appeal to the Superior Court first required (as here), a complaint to the proper administrative body. Since the taxpayers failed to follow their administrative remedies for fiscal year 1973, refunds were disallowed. The Court of Appeals in *Keyes*, aware of the precedential effect of its decision for future class action tax refund cases,[5] also disallowed refunds under a separate theory. The Court went on to state:

> While application of the principles of equity occasionally may be appropriate in tax litigation (e.g., Green) *it would hardly aid the financial stability of this city if this court were to relax the statutory requirements of our Code as they relate to tax litigation and superimpose equity jurisprudence on these statutory requirements.* This should be done only in a rare case (e.g., Green). *Otherwise, financial instability would be promoted.* Tax statutes are necessarily formalistic and often technical. *It is essential that we adhere to their technicalities,* even

[4] The action was brought as an uncertified class action.

[5] 362 A.2d at 736.

> if at times a seeming hardship results to the taxpayer. See, e.g., *George Hyman Construction Co.* v. *District of Columbia*, D.C.App., 315 A.2d 175, 178 (1974). *Among other things, fiscal considerations require that this be done.* Where class action tax refunds for fiscal years in the past are at issue, the relief sought would not emanate from some inexhaustible treasury. The reality is that the funds could only be supplied by an additional tax on innocent taxpayers, or the reduction of services, in an already financially beleaguered city. Only in extraordinary circumstances, not here peresent, should the equity relief sought be afforded. (Footnote omitted; Emphasis supplied; 362 A.2d at 737.)

The result of the *Keyes* case rest on many of the same grounds advanced by the District here.[6]

The following cases are examples of numerous cases which support the position that a strict construction of exclusive statutory remedies for tax refunds is required:[7] *Jones* v. *Liberty Glass Co.*, 332 U.S. 524 (1947); *Rosenman* v. *U.S.*, 323 U.S., 658 (1945) (claims for tax refunds must conform strictly to the requirements of Congress); *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 342 (1937) (if the administrative remedy is fair and adequate, other questions need not be considered, and the substitution of an exclusive remedy directly against the Government is not an invasion of constructional right); *Marboefer Pkg. Co., Inc.* v. *Indiana Department of State Revenue*, 301 N.E. 2d 209 (1973) (where the legislature has by statute created a right, afforded a remedy and prescribed a procedure to be followed in connection with the remedy, that procedure must be strictly followed).

The following cases lend support for the position that a *class* claim for refund at the administrative level (under §47-1586j) is not maintainable.

---

[6] The *Keyes* rationale has been followed by the trial court in *Calvin Humphrey & River Park* v. *D.C.*, Tax Division Docket No. 2221.

[7] It is conceded that these particular cases, unlike Keyes do not involve class action suits.

In *Rose* v. *American Airlines, Inc.*, 331 F.Supp. 72 (N.D. Ill., 1971), plaintiffs brought a class action suit challenging the constitutionality of the Airport and Airway Revenue Act of 1970. The Act imposed an 8 percent tax on domestic flights and a $3.00 ticket tax on international flights originating in the United States. Plaintiffs sought, *inter alia*, that the new airline rates be declared null and void and that the funds collected thereunder be refunded to the public.

The United States Government moved to dismiss the claim for refund brought on behalf of the class since only the named plaintiffs had filed individual claims for tax refund at the administrative level under 26 U.S.C. §7422(a). Section 7422(a) is similar to D.C. Code §47-1586j and reads as follows:

> SEC. 7422. CIVIL ACTIONS FOR REFUND.
>
> (a) NO SUIT PRIOR TO FILING CLAIM FOR REFUND. — *No suit or proceeding shall be maintained* in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive of in any manner wrongfully collected, *until a claim for refund or credit has been duly filed with the Secretary*, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof. (Emphasis supplied.)

In agreeing with the Government's contention in this regard, the Court stated:

> The recent case of *Agron* v. *Illinois Bell Telephone Co.*, 319 F.Supp. 418 (N.D. Ill. 1970) has held that sec. 7422(a) requires that before suit for refund can be filed in the federal cout a claim must have been duly filed with the Secretary *and that this requirement applies individually to all members of a class.* The court concurs with the holding in *Agron* and accordingly the claims of the class for refund are stricken for failure to comply with 26 U.S.C. §7422(a). (Emphasis supplied, 331 F.Supp. 79.)

In *Agron* v. *Illinois Bell Telephone Co.*, 325 F.Supp. 487 (N.D. Ill. 1970),[8] reversed on other grounds, 449 F.2d 906 (7th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972), plaintiff Agron brought a class action claim for refund of federal excise taxes on telephone service. Upon consideration of the parties cross motions to dismiss and for summary judgment, the District Court held that plaintiff subscribers could *not* maintain the action as a class action on behalf of other subscribers. In support of its decision and in terms strikingly similar to the facts of this case, the Court stated:

> While extensive and involved briefs have been submitted by all parties, the complete, if short, answer to the basic issue raised in Count II is that *plaintiff's class action for tax refunds may not be maintained. An action for the refund of federal taxes may only be commenced after an administrative claim has been filed and disallowed*, 26 U.S.C. §7422(a); *United States* v. *Wells Fargo Bank*, 393 F.2d 272, 273 9th Cir. 1968); *Mulcahy* v. *United States*, 388 F.2d 300, 302 (5th Cir. 1968; *England* v. *United States*, 261 F.2d 455, 456 (7th Cir. 1958). Plaintiff has not alleged that any, much less all, of the tens of thousands of claimants on whose behalf he allegedly brings this action have exhausted their available administrative remedies. *Plaintiff does allege that he filed an administrative tax refund claim on behalf of himself and all telephone subscribers similarly situated and that said claim was rejected.* Complaint 123, Ex. 4. *We find that attempt at satisfying the administrative prerequisites to this kind of civil suit to be unsatisfactory. By failing to name the claimants and the amounts due to each, plaintiff's claim on their behalf falls far short of the detail required by federal regulations.* 26 C.F.R. §301.6402-2* See *Herrington* v. *United States*, 416 F.2d 1029, 1031-1032 (10th Cir. 1969).
>
> *Essentially, an unauthorized agent may not "claim an unspecified refund for unknown principals."*

---

[8] The correct citation to *Agron* is 325 F.Supp. 487 and not 319 F.Supp. 418 as stated by the Court in *Rose*.

> *Harkins* v. *United States*, 66-2 U.S.T.C. ¶9543, at 86, 702 (E.D. Okla. 1966), aff'd. on other grounds, 375 F.2d 239 (10th Cir. 1967). Consequently, the only party of whom we are aware that has standing to bring this action under 28 U.S.C. §1346(a)(1) is the named plaintiff, Agron, who, at best, may be said to constitute a class of one. *McConnell* v. *United States*, 295 F.Supp. 605, 606 (E.D. Tenn. 1969); *Lipset* v. *United States*, 37 F.R.D. 549, 551-552. (S.D.N.Y. 1965), appeal dismissed 359 F.2d 956 (2d Cir. 1966). (Emphasis and asterisk supplied; 325 F.Supp. 488.)

In *McConnell* v. *U.S.*, 295 F.Supp. 605 (E.D. Tenn. 1969), the individual claim requirement—financial stability—espoused by respondent here, is set forth as follows:

> Conceding arguendo that the plaintiffs and other striking employees of Kingsport Press, Inc. and their respective spouses may be members of the same class, before any taxpayer may maintain any action to recover *any* internal revenue tax alleged to have been erroneously or illegally assessed or collected, *it is an absolute and indispensible prerequisite that such taxpayer shall have filed a claim for refund or credit with the Secretary of the Treasury or his delegate*, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.
>
> *This serves to advise the appropriate internal revenue officials of the claims intended to be asserted by the taxpayer, so as to insure an orderly administration of the revenue. United States* v. *Felt & Tarrant Mfg. Co.* (1930), 283 U.S. 269, 272 51 S.Ct. 376, 75 L.Ed. 1025, 1027 [1]. "* * * It is vital to the functions of government that taxes be collected promptly and if errors are made, that they be expeditiously corrected. To this end the statute requires the taxpayer to make a timely charge of overpayment with grounds therefor, that the government may make investigation and refund the amount due, if any, wifthout being subjected to the delay and expense of litigation * * *." *Kales* v. *United States*, C.C.A. 6th (1940), 115 F.2d 497, 500, [3], [4], affirm-

> ed (1941), 314 U.S. 186, 193, 62 S.Ct. 214, 86 L.Ed. 132, 138. (Emphasis supplied, 295 F.Supp. 606).

See *Heisler* v. *U.S.*, 463 F.2d 375 (9th Cir. 1972); see also, *Henderson* v. *Carter*, 195 S.E.2d 4 (Ga. 1972) and *Hooks* v. *Comptroller of Treasury*, 289 A.2d 332 (Md. 1972), for similar state cases supporting respondent's position on this point. *Cf., U.S.* v. *Felt and Tarrant Manufacturing Co*, 283 U. S. 269 (1931) and *U.S.* v. *Rochelle*, 363 F.2d 225 (5th Cir. 1966).

The Court notes that petitioners have not cited a single case involving the refund of income or franchise taxes whereby the administrative process was successfully bypassed.

The legislative history of §47-1586j and its federal counterpart, 26 USC §7422(a), further support the District's position on this point. House Report No. 543 (80th Cong. 1st Session, 1947 at 4) on Title XII (in which §47-1586j is contained) of the 1947 Income and Franchise Tax Act for the District of Columbia reads as follows:

> Title XII contains the provision with respect to assessment and collection of taxes, time for payment of the same and certain other *administrative* provisions. (Emphasis supplied.)

The Senate Report (No. 28, 80th Cong. 1st Sess., 1947 at 4) is identical. Moreover, the legislative history of D.C. Code 1973, §47-2413(c), discussed, *post*, makes reference to the award of interest only from the date "on which the District is apprised of the fact that an overpayment is claimed to have been." Compliance with Section 1586j is the only applicable mechanism by which such notice can be given.

The cases interpreting Section 1586j's federal counterpart, 26 U.S.C. §7422(a) and its legislative history are unanimous in ruling that compliance with the statute—individual claims for refund even in class actions—are exclusive and an indispensable prerequisite to bringing suit. In addition to the cases cited above, many other courts have ruled that Section 7422(a) must be *strictly construed in favor of the Government.* See, for example, *Moser* v. *Wood*, 235 F.Supp. 547 (D. Ariz. 1964); *French* v. *Smyth*, 110 F.Supp. 795 (N.D.

Cal. 1952). One of the purposes of strict construction is to give the Government notice of pending claims and thus protect it from stale demands for refunds. See, for example, *Ryan* v. *Harrison*, 146 F.Supp. 671 (Ill. 1956). The exclusivity of the procedure has been upheld since its inception. See, for example, *Kent* v. *No Cal. Reg. Office of Am. Friends Service Committee*, 497 F.2d 1325 (9th Cir. 1974); *DuPont Glore Forgan, Inc.* v. *American Tel. and Tel. Co.* 428 F.2d 1297 (S.D.N.Y. 1977), aff'd 578 F.2d 1366, 1367, (2nd Cir. 1978) *cert. denied*, 99 S.Ct. 465 (1978).

In the *Dupont Glore Forgan* case, *supra*, the U.S. District Court once again rejected a class action claim for refund where all of the individual claimants had not followed the statutory procedure for filing refund claims. The Court went on to state:

> *Many members of the class plaintiffs represent have not filed refund claims,* and even those members of the class who have filed refund claims have not yet brought a refund suit against the government. *If the plaintiffs prevail,* and the defendants in turn are allowed to recover from the government as they seek to do by their third-party complaint, the plaintiff taxpayers will have succeeded in avoiding the strict procedural requirements for obtaining refunds. *In effect they will have obtained a refund of taxes from the government without giving the Internal Revenue Service an opportunity to consider their claims administratively,* and without being subject to the statutes of limitations imposed by the Code. *This would clearly negate the Congressional purpose in enacting the refund provisions of the Code.* (Footnote omitted; Emphasis supplied; 428 F.Supp. 1303.)

In conclusion, where the legislature has provided a right (the refund of taxes illegally or erroneously assessed and voluntarily paid)[9] where none previously existed, the procedure afforded to obtain that right must be strictly follow-

---

[9] See *District of Columbia* v. *McFall*, 88 U.S.App.D.C. 217, 188 F.2d 999 (1951) and *Lindner* v. *District of Columbia*, D.C. Mun.App., 32 A.2d 540 (1943).

ed. The administrative remedy afforded by §47-1586j is fair and adequate and promotes fiscal stability. Moreover, petitioners have failed to demonstrate injury, since class members have received multiple and individual notice of the requirement to file administrative claims for the relevant tax years.

CONCLUSIONS OF LAW

II

THE INTEREST ISSUE

The clear and unambiguous language of §47-2413(c) awards interest on overpayments such as petitioner Kleiboemer *only* from the date of filing a claim for refund. Since petitioner Kleiboemer paid the disputed tax for 1975 and filed a claim for refund on the very same day, the issue is moot with respect to interest on his own particular refund for 1975. The Court's decision on this issue will, however, have a substantial effect on the amount of interest awarded class members who filed separate claims for refund near the statutory deadline (i.e., within three years after payment of the tax).

In support of their position on this issue, petitioners do not cite a single case (Brief at 13-17). Petitioners' argument is that "the traditional way interest is computed" is "from the date the overpayment was paid until the date of refund" (Brief at 14). This traditional rule, petitioners submit, is the federal rule and the rule in all 30 states that have a statute on the subject. Petitioners concede that:

> There is no American jurisdiction *except the District of Columbia* that withholds interest on overpayments of tax until a claim for refund is filed. (Brief at 15.)

It is important to note that the Congress of the United States, acting as a local legislature for the District of Columbia, enacted the interest statute which is codified at §47-2413(c). The same legislative body enacted §6611(b) of

the Internal Revenue Code, which provides for interest "in the case of a refund, from the date of the overpayment . . .", enacted §47-2413(c) which provides for interest on overpayments "*only* from the date of filing a claim for refund . . .". . (Emphasis supplied).

It is equally important to recognize that §§47-2413(c) and 47-1586j must be read in concert. Taken as a whole, these sections underscore the requirement of filing separete claims for refund from which date interest runs. For this court to hold that separate claims are not required by §47-1586j would vitate the meaning of §47-2413(c); if separate claims are unnecessary, then interest could only be computed by totally rewriting the interest statute. Thus, petitioners' argument that §47-1586j does not require individual claims cannot be squared with the method by which interest must be computed under the unambiguous terms of §47-2413(c).

Reference to the legislative history of §47-2413(c) strongly bolsters respondent's argument on this point.

Prior to the D.C. Court Reform Act of 1971 (P.L. 91-358), §47-2413(c) read in relevant part as follows:

> Provided, That with respect to that part of any overpayment which was not assessed and paid as a deficiency or as additional tax such *interest shall be allowed and paid only from the date of filing a claim for refund*, a petition to the Board, or a complaint with a court of competent jurisdiction, as the case may be. (Emphasis supplied; §47-2413(c) (1967 ed.))

For purposes of this case, the quoted language is the same as the present language in §47-2413(c). Thus, the critical language and requirements of §47-2413(c) have not changed since they were first enacted.

The purpose of the 1952 enactment was to provide a procedure for obtaining refunds of overpaid taxes where no such procedure prerviously existed. This was accomplishled by adding a new section (14) to title IX of the District of Co-

lumbia Revenue Act of 1937, consisting of five subsections. The relevant subsection to this issue (subsection (d) prior to 1970 and now codified as subsection (c)) was characterized in a House committee report (H.R. No. 1977, 82nd Cong. 2d Session 1952 as follows:

> (d) Provides for the payment of interest at the rate of 4 percent upon overpayments refunded, whether the refund is made administratively or by order of the Board of Tax Appeals or by order of court of competent jurisdiction, and whether the overpayment refunded resulted from an original payment of tax or from the payment of a deficiency assessment. A distinction is made, however *between overpayments resulting from original or voluntary payment of tax by a taxpayer and overpayments resulting from the assertion of a deficiency or additional tax by the District. As to the former type of overpayment, interest begins to run on the date on which the District is apprised of the fact that an overpayment is claimed to have been made.* If an overpayment is credited rather than abeing refunded to the taxpayer, the date of crediting is intended to be treated as the date of refund for purposes of computing interest, since the crediting of an overpayment wherre authorized is a constructive refund to the taxpayer.
>
> *This subsection (d) of the new section 14 is intended to apply to all overpayments of taxes, including income, franchise,* sales, and use taxes, and thus modifies existing law. (Emphasis supplied; Report at 4.)

To the same effect is S.R. No. 1471 (82nd Cong. 2d Session 1952; a copy of that report is attached as Resopndent's Exhibit No. 4). It is, therefore, beyond dispute that congress intended that interest would begin to run "on the date on which the overpayment is claimed to have been made . . .", i.e., the date of the filing of the individual claim for refund.

Petitioners argue that class "certification rendered it unnecessary—indeed, as we have shown effectively impossible—for individual class members to pursue their own remedies privately . . ." As stated above, Judge Penn ordered individual notice be given to all class members of the statutory requirement to file administrative claims for refund four (4) months in advance of the 1975 deadline and far in advance of the 1976-1978 deadlines. This was done. Thus, the private pursuit of those administrative remedies can most certainly be the measuring rod for the award of interest.

The award of intrerest at 4% from the timely filing of an administrative claim for refund is supported by the unambiguous words of the controlling statute and is supported by reference to its legislative history.

/s/ John D. Fauntleroy
JOHN D. FAUNTLEROY
JUDGE

September 24, 1981

APPENDIX "B"

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

DOCKET NO. 2362

RICHARD A. BISHOP, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

and

DOCKET NO. 2379

AXEL-FELIX KLEIBOEMER, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

PETITONERS' BRIEF REGARDING CLAIM FOR REFUND AND INTEREST ISSUES

/s/ John M. Bixler
/s/ Ronald D. Aucutt
MILLER & CHEVALIER
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Counsel for Petitioner Bishop

/s/ Phillip L. Kellogg
/s/ James L. Lyons
KELLOGG, WILLIAMS & LYONS
1919 Pennsylvania Avenue, N.W.
Suite 702
Washington, D.c. 20006
and
/s/ Bradley G. McDonald
1919 Pennsylvania Avenue, N.W.
Suite 300
Washington, D.C. 20006
Co-Counsel for Petitioner Kleiboemer and Members of the Class

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

FACTS 1

ARGUMENT

I. TAXPAYERS WHO ARE MEMBERS OF THE CLASS ARE ENTITLED TO RECOVER THE UNINCORPORATED BUSINESS TAX PAID BY THEM, EVEN THOUGH THEY HAVE NOT INDIVIDUALLY FILED CLAIMS FOR REFUND WITHIN THE THREE-YEAR PERIOD PROVIDED FOR IN D.C. CODE § 47-1586j, BECAUSE OF PETITIONER KLEIBOEMER'S ACTION AND BECAUSE AS TO THEM THE TAX HAS BEEN HELD TO BE WHOLLY INVALID 4

A. Petitioner Kleiboemer's Timely Filing of the Class Action Commenced the Action for all Class Members 4

B. There is No Jurisdictional Requirement That Every Member of the Class Individually File a Claim for Refund Before Being Permitted to Participate in the Timely-Filed Class Action Suit 8

C. The Court of Appeals Decision in *Keyes* Does Not Preclude Application Here of the Rationale of *American Pipe* 10

II. INTEREST ON ALL TAXES REFUNDED SHOULD BE COMPUTED FROM THE DATE THE TAXES WERE PAID (OR THE DUE DATE OF THE TAX RETURN IF THAT IS LATER) 13

CONCLUSION 17

CERTIFICATE OF SERVICE 18

TABLE OF CITATIONS

Page

Cases (cases chiefly relied upon):*

* *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) 9

* *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974) ..... *passim*

* *Barrett* v. *United States Civ. Serv. Commission*, 439 F. Supp. 216 (D.D.C. 1977) 9

Bishop v. *District of Columbia*, and *Kleiboemer* v. *District of Columbia*, 411 A.2d 997 (D.C. App. 1980) *(en banc)* 2, 3

Clark v. *Lee*, 406 N.E.2d 646 (Ind. 1980) 10

Criterion Ins. Co. v. *Lyles*, 244 A.2d 913 (D.C. Ct. App. 1968) ..... 5n.

District of Columbia v. *Green*, 310 A.2d 848 (D.C. Ct. App. 1973) 2n., 12n., 13

District of Columbia v. *Keyes*, 362 A.2d 729 (D.C. App. 1976), *cert. denied*, 430 U.S. 968 (1977) 11-13

Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) 4

Graves v. *McDonough*, 264 Ala. 407, 88 So.2d 371 (1956) 10

Ishmell v. *District of Columbia*, Civil No. 11152-76 (June 14, 1978) ..... 8n.

Laffey v. *Northwest Airlines, Inc.* 185 U.S. App. D.C. 322, 567 F.2d 429 (1976), *cert. denied*, 434 U.S. 1086 (1978) ..... 9n.

McCarthy v. *Kleindienst*, 183 U.S. App. D.C. 321, 562 F.2d 1269 (1977) 7-8

McDonald v. *United Air Lines, Inc.*, 587 F.2d 357 (1978) *cert. denied*, 442 U.S. 934 (1979) ..... 9n.

* *Thorn* v. *Jefferson County*, 375 So.2d 780 (Ala. 1979) 10

* *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385 (1977) 7

Statutes:

Internal Revenue Code § 6611(b) 14

APPENDIX "C"

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 79-123, 79-547, 81-1232

RICHARD A. BISHOP
and
AXEL-FELIX KLEIBOEMER, *Petitioner-Appellants,*
v.
District of Columbia, *Respondent-Appellee.*

APPEALS FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, TAX DIVISION

APPELLANT'S BRIEF

/s/ John M. Bixler
/s/ Ronald D. Aucutt
MILLER & CHEVALIER, CHARTERED
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: 626-5600
Counsel for Appellant Bishop

/s/ Phillip L. Kellogg
/s/ James L. Lyons
KELLOGG, WILLIAMS & LYONS
1919 Pennsylvania Avenue, N.W.
Suite 702
Washington, D.C. 20006
Telephone: 785-8292
and
/s/ Bradley G. McDonald
1919 Pennsylvania Avenue, N.W.
/s/ John F. Karl, Jr.
Suite 300
Washington, D.C. 20006
Telephone: 338-7800
Co-Counsel for Appellant Kleiboemer and Members of the Certified Class

D. *Due Process and fundamental fairness demand that all class members, having been bound by the judgment against them, have the benefit of this court's reversal of that judgment and decision that the tax is unlawful.*

By reason of the class certification and definition orders entered by Judge Penn in October 1977, all nonresidents who were subject to the tax and paid it, whether or not they filed individual claims for refund, were bound to the judgment order that the tax was not enacted in violation of the Home Rule Act. That binding judgment continued for two and one-half years, until this Court's mandate reversing the judgment was returned to the Superior Court on May 29, 1980. It would be a denial of due process and fundamentally unfair to deprive any of these class members of the benefits of this Court's judgment holding the tax illegal.

Rule 23(c)(3) provides:

> The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the Court finds to be members of the class.

As discussed earlier, the effect of the judgment entered here by Judge Penn in 1977, which described and included "those whom the court [found] to be members of the class," was to bind the class members to the judgment that the tax was lawful. Any subsequent individual suit would have been barred by the doctrine of *res judicata*. *Hansberry* v. *Lee, supra; Laskey* v. *International Union (UAW), supra; Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970). *See generally* 3B *Moore's Federal Practice* ¶ 23.60 (2d ed. 1982). During the two and one-half years Judge Penn's order that the tax was lawful was binding on the class, the three-year time period prescribed in D.C. Code § 47-1586j for filing individual claims for refund expired for taxes paid with respect to 1975 and 1976. To hold, as the District urges

and as Judge Fauntleroy held, that class members who failed to file claims for refund during a period when they were bound by a judgment upholding the tax should now be deprived of the benefits of the reversal of that judgment would be violative of due process.

Such a holding by this Court would be exceptionally unfair. First, because the District has had the benefit of the trial court's ruling for two and one-half years, the District not only was protected from other lawsuits, but, more importantly as a practical matter, was able to compel from the class the collection and the use of millions of dollars in tax revenues, at interest of only 4 percent. Second, no real prejudice to the District would result from granting the benefits of the reversal to all class members. The District has been on specific notice since the outset that the tax was claimed to be unlawful and that *all* taxes paid under the statute by nonresidents were sought to be refunded. And, of course, the District knew from whom and in what amounts it had collected the tax.

On the other hand, to bar recovery for class members who failed to file individual claims would be extremely harsh. The statutory period for filing individual claims *expired* for 1975 and 1976 *before* this Court's mandate holding the tax unlawful was effective. It surely is not unreasonable for some class members not to have filed individual refund claims during a time when they were bound to the trial court's judgment that the tax was lawful.

The District's argument, adopted by Judge Fauntleroy, that members of the class were notified in 1978 that they must file individual claims for refund (and thus were not prejudiced) misses the point. First, as noted, at the time of the 1978 notice the tax had been judicially declared a lawful enactment under the Home Rule Act. More importantly, it is undisputed that many class members, namely those who by reason of death or retirement or otherwise were no longer

operating an unincorporated business in the District, were not on the 1978 mailing list and thus *did not receive the 1978 notice.* Indeed, many class members who did not receive the 1978 mailing but did receive notice of the October 22, 1980, consent judgment responded by filing their claims, only to have them rejected as untimely for 1975 and 1976.

For all of these reasons, we submit that due process and fundamental fairness demand that class members not be denied the benefits of this Court's judgment holding the tax *ultra vires* and unlawful.

APPENDIX "D"

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA TAX DIVISION

DOCKET NO. 2362

RICHARD A. BISHOP, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

and

DOCKET NO. 2379

AXEL-FELIX KLEIBOEMER, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

JUDGMENT ORDER

Pursuant to the opinion and judgment of the District of Columbia Court of Appeals, sitting *en banc*, entered February 12, 1980, and the mandate thereupon, returned to this Court May 29, 1980, judgment in favor of the petitioners is hereby entered this *22nd* day of October, 1980, and it is ordered as follows:

I

1. The class consists of those taxpayers described in the orders of this Court filed in these cases on October 18, 1977, and October 27, 1977, that is: (A) all nonresident professionals (except petitioner Richard A. Bishop) who may not incorporate by law, customs, or ethics except under D.C. Code §29-1101 *et seq.*, and who have paid the tax imposed by D.C. Code §47-1574b by reason of the amendment of D.C. Code §47-1574 by section 605 of D.C. Law 1-23; and (B) those non-residents who carry on a trade or business in the District of Columbia in which more than 80% of the gross income is derived from the personal services actually rendered by the individual or members of that trade or business in which

capital is not a material income-producing factor and who have paid such tax.

2. The District of Columbia is directed to refund the District of Columbia unincorporated business taxes paid by or on behalf of petitioner Axel-Felix Kleiboemer, all members of the class, and Richard A. Bishop, pursuant to D.C. Code §47-1574b, as provided in the succeeding paragraphs of this Order, together with interest as provided by law.

3. The District of Columbia is directed to make no refunds of such taxes to petitioner Kleiboemer and members of the class or to petitioner Bishop until this Court has ruled upon appropriate applications by counsel for attorneys' fee and expenses.

4. In making refunds of the unincorporated business tax to petitioner Kleiboemer and the class of taxpayers he represents and to petitioner Bishop, the District of Columbia shall first:

a. Deduct, except from the refund payable to petitioner Bishop, a proportionate amount of attorneys' fee and expenses as will be directed by this Court; and

b. Deduct for each taxable year the $25 annual *per capita* license fee which, if section 605 of D.C. Law 1-23 had not been enacted, would have been imposed by D.C. Code §47-1591 on persons who conduct a trade, business, or profession in the District of Columbia, including shareholders of professional corporations, but excluding salaried employees, provided such persons have gross income of $12,000 or more during the taxable year.

5. On April 1, 1981, or, if later, promptly after this Court has ruled on the application of petitioners' counsel for attorneys' fees and expenses, refunds shall be made, and attorneys' fees and expenses awarded shall be paid, except for:

a. amounts still in dispute because any of the issues set forth in Part II of this Order have not been finally determined, which amounts shall be refunded promptly by the

District in accordance with a further Order of this Court if any such issues are finally determined in favor of the class members, and

b. amounts which cannot be determined because of a taxpayer's failure to provide the information requested by the notice referred to in paragraph 8 of this Order, which amounts the District of Columbia is directed to refund as soon as possible after receipt by the District of the necessary information.

6. If a partnership or professional corporation which has paid the tax is or was at any time after 1974 composed of resident as well as nonresident members, or if an individual who has paid the tax is or was at any time after 1974 a resident, the District is hereby directed to make refunds for each year only of the amount of tax paid with respect to nonresident members' shares of the income of the partnership or professional corporation, or with respect to the individual's income earned while a nonresident, recognizing that this order does not relate to refunds of tax paid with respect to resident members' shares of partnership or professional corporation income, or to the income of an individual earned while a resident.

7. For purposes of determining the award of attorneys' fees, the District of Columbia is hereby directed to assemble and to provide in writing to this Court and to taxpayers' counsel, prior to December 5, 1980, a close approximation of the total tax collected from nonresident class members.

8. The District of Columbia is directed prior to October 25, 1980, to notify at its expense all taxpayers who have paid the tax imposed by D.C. Code §47-1574b by reason of the amendment of C.C. Code §47-1574 by section 605 of D.C. Law 1-23, whether or not they have filed a claim for refund, (1) of their possible right to receive a refund of the tax paid by them in accordance with this Order; and (2) of the petition for attorneys' fees and expenses which is to be filed, the procedure for filing comments or objections thereto, and the date

and time of hearing thereon. The notice shall be mailed to said taxpayers at the addresses shown on their most recently filed unincorporated business tax returns and shall be in substantially the form attached hereto as Exhibit 1. Notices mailed to taxpaying partnerships and professional corporations will constitute notice to the partners and professional corporation shareholders. The counsel for petitioners are directed to publish the foregoing notice in substantially the form attached hereto as Exhibit 1 in two newspapers of general circulation in the District of Columbia on one occasion as soon as practicable but no later than November 28, 1980. The District of Columbia is directed to pay the cost of such publication, which cost shall be deducted from the refund of taxes and accumulated interest.

II

The following disputed issues are to be decided by this Court prior to the payment of any refunds of tax or interest attributable to the resolution of said issues:

1. Whether a taxpayer who has failed to file a claim for refund under D.C. Code §47-1586j within three years from the time the tax was paid is entitled to receive a refund of the tax paid or, alternatively, whether the filing herein by the petitioner Axel-Felix Kleiboemer of his individual claim for refund, his claim for refund filed for the class, and his class action petition constituted the timely filing of a claim or the timely filing of a petition by the members of the class.

2. Whether a taxpayer is entitled to receive a refund of tax paid for a year or years for which the statute of limitations has *not* run if he fails to file a claim for refund under D.C. Code §47-1586j.

3. When interest as provided by law begins to run.

4. Any other issues that may be presented to the Court for resolution.

III

Petitioners shall file their initial pleading setting forth their contentions and supporting authorities with respect to the issues set out in Part II of this Order by November 7, 1980.

The District of Columbia shall file its contentions and authorities in opposition thereto by November 28, 1980.

Petitioners shall file their application for attorneys' fees and expenses by November 28, 1980. A hearing shall be held on the application for attorneys' fees and expenses at 9:30 a.m., December 22, 1980, in Courtroom 42, 500 Indiana Avenue, N.W., Washington, D.C. 20001.

/s/ John D. Fauntleroy
Judge

Consented to by:

/s/ Philip L. Kellogg
Esquire

/s/ James L. Lyons
Esquire

/s/ John M. Bixler
Esquire

/s/ Ronald D. Aucutt
Esquire

Attorneys for Petitioner Bishop

/s/ Bradley G. McDonald
Esquire

Attorneys for Petitioner Kleiboemer and the Class

Consented to, except for the amount of attorneys' fees to be awarded by the Court, with which the District of Columbia will neither agree nor disagree.

/s/ Judith W. Rogers
Corporation Counsel, D.C.

/s/ James E. Lemert
Deputy Corporation Counsel, D.C.

/s/ Richard L. Aguglia
Assistant Corporation Counsel, D.C.

Attorneys for Respondent District of Columbia